U.S. Department of Labor

Office of Administrative Law Judges
St. Tammany Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, LA 70433-2846

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 02 November 2005

CASE NO. 2005-LHC-199

OWCP NO.: 08-094332

IN THE MATTER OF

WILLIAM R. BOWEN
Claimant

v.

MAC HUNT CORPORATION
Employer

and

EMPLOYERS INSURANCE OF
WAUSAU

APPEARANCES:

Phil Watkins, P.C.
On behalf of Claimant

John C. Elliott, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by William R. Bowen (Claimant) against Mac Hunt Corporation (Employer)and Employers Insurance of Wausau (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of

Administrative Law Judges for a formal hearing. Rather than going to a hearing the parties submitted a stipulated record consisting of 80 Claimant and 44 Employer exhibits.

Claimant's exhibits include the following: LS-18,141,200,201,202,203,206, 207,208, 280 (CX-1 to 3, CX-12 to 15, CX 17 to 23, CX-52 to 57, CX-65,66, CX-68 to 70, CX-72,73); OWCP 3,5,16,25 (CX-4 to 11, CX-58 to 64, CX-67, CX-71); application for limitation of liability (CX-16); correspondence from Attorney Elliott to Dr. Ralph J. Kovach (CX-24); medical reports and depositions of Dr. Kovach (CX-26,30, 31); Claimant's deposition and recorded statements (CX-27, 75,76); Claimant's file (CX-77); depositions of Drs. John Patrick Flanagan and Philip John Lewandowski (CX-28,29); medical records from Drs.Thomas Teater, Flanagan, Thomas C. Stan, C.C. Reemsnyder, Gary Snook, F.Allen Johnston, Robert H. Bell, Mark R. Anderson , Donald Beringer, Lewandowski, David H. Trotter, William T. Reed and from Union Hospital Association, Akron Radiology, Inc., Akron City Hospital, Spohn Hospital, St. Thomas-Summa Health System Hospital (CX-35 to 50); medical records from Marty Crutchfield (CX-74); records and deposition of William Quintanilla (CX-78,80); applications for limitation of liability (CX-16,32); compensation payments (CX-33,34); Employer's first report of liability (CX-51).

Employer exhibits consisted of various DOL forms (LS -18,200, 207,208, OWCP- 5; Claimant's response to discovery; records of compensation and medical benefit payments; Claimant's work reported to SSA; Claimant's vocational rehabilitation file, tax returns, and social security earnings records; various statements by Claimant; medical records from Drs. Snook,Flanagan, Scott Miller, Teater, Bell, Allen Johnson, Lewandoski, Kovach; vocational report and deposition of William Quintanilla; Employer application for limitation of liability; depositions of Drs. Flanagan, Lewandowski, and Kovach. [1] Post-hearing briefs were filed by the parties.2 Based upon the stipulations of the parties, the evidence introduce , and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

---

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-____; p._____. Employer submitted its exhibits in the correct bound form. Claimant's exhibits were submitted unbound requiring several hours of work for proper assembly. Claimant's exhibits also contained many duplicates as indicated below. Where duplicates exists, references will generally be made to only one exhibit. The following were duplicates: EX-1 and CX-1; EX-2 and CX-54; EX-4 and CX-22; `EX-19 and CX-14; EX-20 and CX-23; EX-22 and CX-75;EX-23 and CX-26; EX-24 and CX-40; EX-25 and CX-40; EX-26 and CX-37; EX-27 and CX-44; EX-28 and CX-36; EX-29-CX-42; EX-30 and CX-41; EX-31 and CX-45; EX-33 and CX-60; EX-35 and CX-26; EX37,38 and CX-16,32; EX-39 and CX-27; EX-40 and CX-28; EX-41 and CX-29.EX-42and CX-30;EX-43 and CX-31.

2 On July 15, 2005 Claimant's Counsel submitted a 22 page brief. On July 7, 2005, Employer's counsel submitted a 19 page brief followed by a reply brief on July 26, 2005 of 6 pages in which Employer's counsel correctly notes that Claimant relies upon the overruled "true doubt rule" citing *Director v. Greenwich Collieres,* 512 U.S. 267 (1994) and *Conoco v. Director,* 1194 F.3d 684 (5th Cir. 1999). Employer's counsel further correctly notes that Claimant has the burden of persuasion and that Employer to rebut a Section 20(a) presumption does not have to produce evidence ruling out all possible connections between employment and the injury. However Claimant did not argue for a "ruling out standard" Rather Claimant argued that

I. STIPULATIONS

The parties stipulated and I find:

1. Claimant injured his right knee on June 6, 1988 during the course and scope of his employment with Employer

2. Employer was advised of the injury on June 6, 1988.

3. Employer fled a notice of controversion April 29, 2004.

4. An informal conference was held on September 20, 2004.

5. Claimant's average weekly wage at the time of the June 6, 1988 injury was $670.12.

6. Employer paid Claimant temporary total disability benefits from November 26, 1990 to July 30, 1991, and medical benefits from June 7, 1988 to May 2, 2004.

7. As a result of the June 6, 1988 injury, Claimant suffered a 50% disability to his right lower extremity with Claimant reaching maximum medical improvement on March 26, 1991.

8. Prior to the June 6, 1988 injury Claimant had a 20% impairment to his right lower extremity.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation /intervening cause from slipping on ice.

2. Nature and extent of injury

3. Section 8 (f) limitation of liability

4. Credits for overpayment while Claimant was working.

5. Necessity of surgery recommended by Dr.Lewandowski3

6. Payment of benefits at a temporary total disability rate since April 29, 2004.

7. Attorney fees and compensation under Section 28 of the Act.
737

Employer may not rely upon speculation but must furnish facts to overcome the presumption.

3 Since neither party address this issue in their brief, I shall not treat this issue.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 63 year old male born on April 27, 1942. Claimant has high average intelligence, a 12th grade education and past work as a marine construction superintendent from December 1979 to December 1983 for Goldston Corporation Due to a serious accident which occurred on December 15, 1983 in which Claimant was knocked over a Port Lavaca,Texas bridge guard rail, fell a distance of 60 feet and sustained multiple injuries, Claimant ceased work and remained unemployed until June 1984 when Employer hired Claimant as a marine superintendent. In that capacity Claimant worked for Employer until November 1988 when due to a June 6, 1988 job injury Claimant was forced to switch jobs becoming a commercial and industrial construction superintendent for C.T. Taylor Company which he performed until November 1990. Social Security earnings records show Claimant making $32,200.00 with Employer in1988 followed by earnings for the remainder of 1988, 1989 and 1990 of $2,707.00, $32,063.00 and $31,737.00 while working for C.T.Taylor. (EX-15,16)

Claimant was off work due to surgery from November 1990 through July 1991 when due to rehabilitation efforts he resumed work as a truck driver for two different employers until January 10, 1995. (EX-6,7,12,14,18, 20; CX-4 to 11; CX-58,59, 61-64, 67). As a truck driver Claimant made only $7,448.00 in 1991 (EX-19). Claimant earned $20,281.00 in 1992, $14,147.00 in 1993, $2,871.00 in 1994 and $1,387.00 in 1995. (EX-17). During the 187 week period from August1 1991 through January 10, 1995 Claimant's total earning amounted to $46,134 for an average weekly wage of $246.71. Because Claimant lost no work time from the June 6, 1988 injury until November 26, 1990, Employer initially paid Claimant for only a scheduled injury at 15%, then 20% and finally at a 50% rate. From November 26, 1990 through May 2, 2004 Employer paid Claimant temporary total disability at weekly compensation rates of $300.00 to $446.75 for a total of $327,642.75 (EX-9,10). 4

Commencing with a December 1983 accident Claimant has a complicated medical history resulting in over 26 surgeries to his right and left knees, hip, neck and shoulders. Claimant's treating physicians have included orthopedists, Dr Snook (December, 1983 to February 1987); Dr Flanagan (March 1989 to April 2002); Dr. Lewandowski (February 1995 to July 2004); Dr. Johnson (July 1996 to August 1998); Dr Bell.(1995-1999) (EX-6) On December 28, 1983 Claimant was admitted to Spohn Hospital in Corpus Christi, Texas where Dr. Snook treated Claimant for a comminuted fracture and dislocation of the right acetabulum, fracture of left ribs, depressed left tibial fracture with insertion of Steinman pins. Claimant was discharged on December 29, 1983 and readmitted on January 26, 1984 for removal of Steinman pins followed by an admission on February 19, 1984 for a bilevel cervical laminectomy to repair herniated cervical disc. (EX-24,p.1). On August 12, 1984 Claimant was readmitted due to marked chondromalacia in both knees for which he underwent arthroscopy with bilateral knee shaving and removal of hardware from left tibia.

4 Employer filed a series of LS-208s (CX-2,12,219, 56 57, 66) showing varying dates and amounts of compensation. Although the total amount shown paid of $325,238.03 is close to the amount shown on the computer print outs, the dates and rates of compensation appearing on the LS-208 s were in many cases inaccurate when compared to actual computer payment records.

On August 28, 1984 Claimant was readmitted due to a left knee infection and underwent an aspiration of the left knee. (EX-24, p2). On May 22, 1986, Claimant was readmitted due to degenerative joint disease of the left knee and chondromalacia of the right knee and underwent an arthroscopic removal of loose bodies, debridement and shaving of both knees. (EX-24, p3, 12) Correspondence from Dr.Snook to carrier, Texas Employers showed Claimant having considerable problems with his left knee requiring a possible future oseotomy and a loss of sensation of the peroneal function of the right hip requiring a possible future total hip prosthesis. (EX24, pp. 5,9) On October 7, 1986, Dr. Snook opined that due to continued hip and left knee complaints, Clainmant would likely need total knee and hip replacements at an early age (EX-24, pp17,18).

On June 6, 1988, Claimant while installing a large generator on the m/v New York Sun, twisted his right knee as he was stepping over a bulkhead and hit from behind by a spring loaded hatch door. (EX-1,6). The following day Claimant saw Dr. Snoop who upon examination found an absent anterior cruciate ligament, bucket handle tear, positive McMurray sign, lack of extension and effusion of the right knee. On June 8, 1988, Claimant underwent a arthroscopy and menisectomy of the right knee plus and injection and aspiration of large joint of the right hip (EX-25, pp.1-3). In a subsequent treatment note of November 15, 1988 Dr. Snook described the 1983 injury as a significant neck, back, right leg and hip injury causing Claimant to be unable to walk up and down slopes and having difficulty on uneven ground. Dr. Snook recommended a change of occupations from heavy construction to an occupation allowing alternate sitting and walking on solid level flooring.(EX-25, p6). In a letter of October 31, 1989 addressed to Carrier, Dr, Snook rated Claimant with a 75% loss of function of the right lower extremity needing a total hip replacement in the future with permanent right sciatic nerve injury to the right leg translating into a 50% total body impairment. (EX-25, p 10).

In March 1989 Claimant began treatment with Dr. Flanagan. Early treatment records show Claimant with severe right knee and hip pain with zero degrees of internal or external hip rotation and x-ray evidence of early degeneration in both areas. . For relief Dr. Flanagan injected the right knee with celestone and xylocaine. On June 3, 1989 Claimant irritated the right lateral humeral epicondlyle by roofing activities and sustained an invervsion injury of the left ankle when he dropped into a 8 inch hole. On August 2, 1989 Dr. Flanagan noted that Claimant had been seen on multiple occasions for right hip and knee pain with restricted motion and early post-traumatic degenerative arthritis (EX-26 pp.1-3). On April 4, 1990 Claimant underwent a chondroplasty, patella femoral joint and partial lateral meniscectomy of the right knee due to pain for the past two years with operative findings of a lateral meniscus tear and chondromalacia of the patella femoral joint. . On February 20, 1991, Dr. Flanagan limited Claimant to sedentary activities which did not require prolonged standing, walking, bending or stooping noting that there was no doubt that the injuries to his right knee put additional stress on his bad left knee and right hip joint. (EX-26, pp.14, 15).

On March 26, 1991 Dr. Flanagan stated Claimant was at MMI and provided the following restrictions: sitting 3 hours (continuous); walking, lifting, bending 1 hour each (intermittent); no climbing,kneeling squatting; twisting 1 hour (intermittent); standing 2 hours(intermittent); lifting 20 to 50 pounds; light use of foot controls, driving car or van only. (EX-26 p.20). On September 8, 1993 Dr. Flanagan performed an arthroscopic repair of a right lateral

meniscal tear and on March 2,1994 a total hip replacement due to traumatic degenerative joint hip disease. (EX-26 pp.30, 34-46)

Subsequent treatment notes show good results from the hip replacement but recurrent and significant right knee pain causing antalgic limp, followed by a falling incident on November 15, 1994 wherein he turned to say something to his wife, missed two steps fell onto his right knee and another fall on January 12, 1995 where he slipped on ice while getting out of his truck causing a dislocated left shoulder. (EX-26p.47-51) Subsequently on February 1, 1995 Dr. Bell operated on Claimant to repair a massive left shoulder rotator cuff repair followed by a decompressive acromioiplasty on the right shoulder to repair another massive rotator cuff tear (EX-29).

On January 31, 1996, Claimant under went a anterior cervical decompression, fusion and grafting with instrumentation by Dr. Scott Meniller. (EX-27). This was followed by additional knee surgery, bilateral knee arthroscopy, by Dr. Johnston on June 5, 1997. (EX-30).On December 13, 1996, Dr. Johnson in response to Claimant's concern about work limitations stated:

> From an orthopedic standpoint, he is unable to return to work as a truck driver. However he is capable of performing some occupations, and those would be in the nature of very sedentary work which has extreme flexible working conditions ...due to the nature of his right hip and both knees. If he is doing desk work, he will not be able to do it in a position that allows his head to be either bent over or looking up, because of his cervical fusion and continuing neck discomfort.
>
> (EX-30,p.10)

When seen by Dr. Flanagan on February 18, 1999, Claimant was noted to have numerous arthritic complaints associated with left knee bone on bone deformity requiring a total knee replacement,. In addition Claimant had osteoarthritis in both knees, hips , hand and spine and shoulders to make him in Dr.Flanagan's opinion unemployable. (EX-26,p.67). On July 13, 1999 Dr. Flanagan performed a total left knee replacement and a revision of the left knee arthroplasty in January, 2000, followed by treatment in April 2002 for a right hip replacement.

On May 28, 1999, Dr. Flanagan imposed the following restrictions : sitting (6 hours); no walking, squatting, climbing, kneeling, twisting; lifting (10 to 20 pounds, 1 hour); bending (1 hour); standing (2 hours); no work above shoulder; no use of foot controls or driving. Claimant unable to work an 8 hour day (CX-71).

Claimant continued to have significant knee and hip pain requiring additional surgery in 2001 and 2004. On October 1, 2001, Dr. Lewandowski performed a total right hip revision with synovectomy and polyethylene liner and femoral head exhange. This was followed by a total right hip revision on December 3, 2002 due to a right hip dislocation. On July 8, 2004, Dr. Lewandowski performed a right knee arthroscopy, medial and lateral meniscectomy and chondroplasty. (EX-31).

On February 21, 2005, Employer had Claimant evaluated by orthopedist, Dr. Kovach. After reviewing Claimant's medical records and examining him, Dr.Kovach diagnosed degenerative arthritis of the right knee, noted a 1988 injury involving a tear of the medial and lateral menisci and a bucket handle tear with pre-existing grade I and II osteochondral changes of the knee joint and an absent anterior cruciate ligament. Dr, Kovach opined that Claimant had residual permanent impairments from the 1998 injury as well as pre-existing permanent impairments from the 1983 injury which were made materially and substantially greater by the 1988 injury, namely a deficient anterior cruciate ligament superimposed upon torn menisci resulting in anterior instability of the right knee joint. As a result of this condition, Dr Kovach imposed the following restrictions: sit (8 hours continuous); walk, bend, lift (2 hours each intermittent); squat, climb, kneel, twist (none); stand (2 hours i); lift(0-10 pounds).(EX-30).

B. Claimant's Testimony

Claimant's testimony centered around his work history, 1983 and 1988 work injuries and subsequent medical treatment and limitations. Claimant described his initial marine superintendent work for Goldston building tugs and dock works, mooring ships and dredging channels followed by the 1983 accident and surgery with subsequent employment with Employer in August 1994 followed by the 1988 accident which is the basis of the present claim. Notwithstanding the 1983 accident Claimant was able to do a full range of marine work working on barges all over the south Texas coast between 10 to 16 hours a day. Claimant had some residual left knee and right him pain from the 1983 injury.

According to Claimant the 1988 knee injury aggravated Claimant's hip and back problems causing him to quit working for not only Employer but C.T. Taylor and subsequent trucking jobs. Claimant testified about falling on a number of occasions do to his right knee locking up or giving away. As a result of these falls all his attempts at rehabilitation have been nullified. Due to right leg and ankle pain Claimant is unable to do even sedentary work. Currently Claimant is taking Zoloft for depression, Zestrill for blood pressure, Lipitor for cholestrol, insulin, and Vicodin and Tylenol 3 for pain. Claimant's activities are generally limited to taking care of personal needs, cooking, driving short distances and walking behind a power mower (EX-39). In all Claimant has undergone 35 surgeries.

C. Testimony of Drs. Flanagan. Lewandowski, and Kovach

Dr. Flanagan, who has treated Claimant on numerous occasions from 1989-2001, described Claimant's 1983 injuries to include a severe damage to the hip and knee areas resulting in a 20 to 30% right lower extremity, 20 to 30% left lower extremity and 10% neck impairment. On March 26, 1991, Dr. Flanagan found Claimant at MMI with lifting limited to 20 to 50 pounds; sitting 3 hours (continuous); walking, lifting, bending 1 hour each (intermittent) no climbing, squatting, squatting ; twisting 1 hour (intermittent); standing 2 hours (intermittent); light use of foot controls; driving car or van only.

By May 28, 1999, Dr. Flanagan had reduced Claimant to lifting only 10 to 20 pounds, limited sitting to 6 hours with 1 hour each for lifting and bending and no walking or use of foot controls or driving. (CX-71). By December 18, 2000 Claimant was unemployable.

Dr. Flanagan testified that Claimant's 4 right knee arthroscopies had led to a lack of stability or steadiness of the right leg and resulted in a disturbed right gait putting additional stress on the right hip making the hip worse than what it would have otherwise had been. (EX-40, pp. 30-34). Further Claimant's condition has been deteriorating since the first time he saw him and have rendered him unable to work Dr. Flanagan has operated on Claimant on 5 occasions performing multiple knee and hip procedures. (EX-40, pp. 37-42).

Dr. Lewandowski described his operations on Claimant with Claimant's most significant problem coming from meniscal tears and grade III chondral damage to the right knee which in turn could cause knee, ankle or hip pain and make it difficult for Claimant to work. Dr. Lewandowski was unable to say whether Claimant's hip problems were related to the 1983 or 1988 injuries inasmuch as he had not reviewed those records. However he did opine that 4 knee surgeries could make Claimant unstable on his feet. Further Claimant's numerous physical problems and use of pain medication would make if difficult for him to work.(EX-41, pp. 27-37).

Dr. Kovach, who examined Claimant on one occasions and reviewed Claimant's medical records at Employer's request testified that Claimant upon examination complained of problems with walking and prolonged standing causing his right knee to frequently lock and make him fall. Dr. Kovach found evidence of interior right knee instability and degenerative arthritis but would attribute Claimant's hip or back problems only to the 1983 and not the 1988 accident Dr. Kovach found that Claimant had denuded cartilage, a softening of cartilage on the crest of the knee cap and an absent ACL onright knee associated with the 1983 accident.

Dr. Kovach testified that Claimant could sit for 8 hours, walk intermittently for 2 hours, lift up to 20 pounds, walk behind a pull lawnmower for 1/2 acre, drive a car but should avoid squatting, climbing, kneeling, or twisting. In his estimation Claimant had a 27% impairment to the lower extremity and could do sedentary work with no prolonged standing, walking, bending or stooping. Further Claimant was unable to perform his past marine superintendent work. (EX-42,43).

D. Testimony of Vocational Expert, William Quintanilla

Mr. Quintanilla conducted a telephone interview with Claimant on March 30, 2005 and reviewed Claimant's medical and earnings record. Mr. Quintanilla reviewed the depositions of Drs. Flanagan and Kovach and interpreted Dr. Flanagan saying Claimant could do sedentary work and Dr. Kovach as saying Claimant could do sedentary work with occasional lifting of 10 to 20 pounds with intermittent standing and walking. Based upon those alleged assessments Mr. Quintanilla found Claimant able to work as a dispatcher, security guard, surveillance system monitor and telephone solicitor.Mr. Quintanilla identified the following positions as suitable:

Employer	Position
Boss Security & Safety Akron, Ohio	non-commissioned security guard sedentary to light, $6.00 to $8.00 per hour

Securitas Security Services Akron, Ohio	non-commissioned security guard sedentary to light, $6.00 to $8.00 per hour
Trucking Co. Transportation Medina, Ohio	dispatcher sedentary, $8.00 to $10.00 per hour
M & M Security Specialists Youngstown, Ohio	non-commissioned security guard sedentary to light, $5.50 per hour
Kelly Services Corpus Christi, Texas	dispatcher/clerk sedentary. $9.00 per hour
Snelling Personnel Corpus Christi, Texas	dispatcher sedentary, $20,000.00 per year depending upon experience
Crowne Solutions Corpus Christi, Texas	non-commissioned security guard sedentary to light, $6.50 per hour
Initial Security Corpus Christi, Texas	non-commissioned security guard sedentary to light, $8.00 per hour

(EX-36,44)

In identifying the above listed jobs, Mr. Quintanilla talked to the Employers only by phone telling them that Claimant had some restrictions to sedentary work. (EX-44, pp.25,26).

IV. DISCUSSION

A. Argument of Parties

Claimant contends that his 1988 right knee injury contributed to and an aggravated previous 1983 knee, hip and knee and cervical problems and contributed to a subsequent January 1995 shoulder injuries so as to render Claimant entitled to a continuation of permanent and total disability benefits beginning on January 10, 1995 to present and continuing citing *Gardner v. Director, OWCP,* 640 F.2d 1385 (1st Cir. 1981); *Strachan Shipping v Nash,*782 F.2d 513 (5th Cir. 1986); *Lopez v. Southern Stevedores,* 23 BRBS 295 (1990). Section 20 (a) applies to link

Claimant's 1988 work related injury with his subsequent claim for benefits absent substantial evidence to the contrary. *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989).

Once invoked Section 20 (a) shifts the burden to the Employer to rebut the presumption with substantial countervailing evidence. *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075 (D,C. Cir) *cert denied* 429 U.S. 820 (1976); *James v Pate Stevedoring Co.* 22 BRBS 271 (1989). Substantial evidence consist of facts and not speculation or hypothetical probabilities. *Smith v. Sealand Terminal,*14 BRBS 844 (1982); *John J. McMullen and Associates, Inc.,*13 BRBS 707 (1981). A subsequent injury is compensable if it is the direct and natural result of a compensable primary injury as long as the subsequent progression is not shown to have been worsened by an independent cause. *Mississippi Coast Marine, Inc. v. Bosarge,* 637 F.2d 994 (5th Cir. 1981). Further if an employee who suffers from a compensable injury as a natural result of the primary injury, the two fuse into one compensable injury *Cyr v. Crescent Wharf & Warehouse,* 211 F. 2d 454, 457 (9th Cir. 1954); See also *Bludworth Shipyard Inc. v Lira* 700 F.2d 1046 (5th Cir. 1983).

Claimant contends that as early as June 1988 Claimant had marked difficulty walking on uneven surfaces due to loss of the anterior cruciate ligament and subsequent meniscal removal with recurrent episodes of right knee giving away putting additional stress on his right knee and hip joints making them worse than they otherwise would have been. Further no doctor would allow Claimant to return to his former marine superintendent work and none of the jobs identified by Mr. Quintanilla were appropriate in that none showed how many hours a day a person would be on his feet, how much walking he would have to do at anytime, nor the amount of time required for other activities.

Employer argues that (1)Claimant incurred only a scheduled injury as a result of the 1999 fall and continued to have an earning capacity as evidence by successful DOL rehabilitation which placed Claimant in two driving jobs from which he earned $7,448.00 in 1991, $20,281.00 in 1992 and $14,147.00 in 1993 ; (2) Claimant's fall on the ice on January 10, 1995 which resulted in a cervical fusion and shoulder surgeries was not a natural progression of a right knee injury but an intervening cause (walking on ice formed by improper drainage); (3) suitable alternative employment was shown by the driving jobs and those jobs identified by Mr. Quintanilla; (4) Employer is entitled to Section 8 (f) relief; (5) the true doubt rule has been overruled by *Green*wich Collieres with the burden of persuasion place on Claimant citing *Conoco v. Director* with Employer

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and

supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avonldale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

After reviewing the entire record, I am convinced that Claimant is a sincere and honest witness who has demonstrated an extraordinary desire to work despite multiple surgeries involving his neck, hip (total replacements) knee (total left with multiple procedures on both knees). Indeed his treating physicians have commented favorable about his work ethic

C. Section 20(a) Presumption - Establishing a *Prima Facie* Case

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment

is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding the claimant failed to meet testimony linking the harm to his work was not supported by the record).

In this case it is clear that Claimant sustained major damage to his right knee on June 6, 1988, requiring arthroscopy and meniscectomy with injection and aspiration of a right hip joint. According to treating physician Dr. Flanagan this injury put additional stress on Claimant other joints including a bad left knee and right hip joint plus increased right knee degeneration and creating right knee instability causing Claimant to fall on numerous occasions. Two of Claimant's major falls occurred on November 15, 1994 wherein he fell down a flight of stairs and onto his right knee and a subsequent slip and fall on an ice buildup on January 12, 1995 causing shoulder injuries and preventing further work. Thus Claimant established a Section 20 (a) presumption.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc.*

v. Director, OWCP, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The Court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 ,(citing *Conoco, Inc.,* 194 F.3d at 690). *See Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

In this case Dr. Kovach,who saw Claimant on one occasion found no relationship between the 1988 injury and subsequent aggravation of other joints. Dr.Lewandowski was unsure of any aggravation but was not privy to prior medical records. Dr. Kovach's statement is sufficient to meet the minimal substantial evidence standard.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

Weighing all evidence I find the testimony of Dr. Flanagan who treated Claimant over many years to be far more impressive than the one time evaluation of Dr.Kovach and clearly establishes aggravation of other joints. (CX-37, pp.2,3,4,6; CX-28,pp.11, 18, 33,34). There is moreover no credible medical evidence of any independent intervening cause when Claimant slipped on some ice and no evidence of any intentional conduct by Claimant to harm himself. Rather the fall appears to have resulted at least in substantial part to chronic right knee instability that was causing Claimant to fall on numerous other occasions. Additionally there is no question that the1988 injury cause some if not all the right knee pathology including progressive degenerative arthritis.(CX-41). While it is true that Dr. Snook opined in 1986 that Claimant would eventually need a total knee and hip replacement at an early age, there is no testimony from Dr. Snook about when these procedures would be necesssary or the effect Claimant's unstable gait would have on such procedures.

D. *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job

due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984)

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

(2)(a) Claimant's Age Background, Experience, and Physical Limitations

(2)(b) Alternative Employment Identified by Employer

(2)(c) Averaging Earnings From Different Jobs

When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc. v. Pulliam*, 137 F 3d. 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc. v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997) (holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); *Louisiana Insurance Guaranty. Ass'n v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994) (finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

Employer contends that Claimant found suitable alternative employment first through DOL's rehabilitation services wherein he found driving jobs starting on July 31,1991 through January 10, 1995 resulting in the following earnings: 1991-$7,448; 1992-$20,281.00; 1993-$14,147.00; 1994-$2,871.00; 1995-$1,387.00 for a total of $46,134 divided by 179.5 weeks = $257.01 per week. Concerning the job identified by Mr. Quintanilla, Employer contends his recent labor market survey of March 2005 showed Claimant with an earning capacity of $400.00 per week. Claimant contends none of the jobs are appropriate because none show the actual amount of time required for any activity such as standing, walking, or sitting. Even by Mr. Quintanilla's own admissions he did not discuss Claimant's exact work limitations nor did he apparently inquire about specific job activity requirements. Thus I agree with Claimant that none of the jobs identified in Mr. Quintanilla's labor market survey are appropriate except for the jobs actually performed by Claimant following his 1988 injury and that it is appropriate to average the earnings of those jobs to find Claimant's earning capacity

Thus during the period from July 31, 1991 through January 10, 1995, Claimant is entitled to a period of permanent partial disability of $670.12 - $257.01 = $413.11 x 2/3 or $275.41. From March 26, 1991 through July 30, 1991 and from January 11, 1995 to present and continuing Claimant is entitled to permanent total disability based upon an average weekly wage of $670.12 with an effective compensation rate of $446.75.

D. Section 8 (f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F. 2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183,187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was

manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the preexisting condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). Additionally, the Board has upheld the denial of Special Fund relief where the ALJ has found the aggravation too minimal to have contributed to the employee's ultimate disability. *Stokes*, 18 BRBS at 241.

In this case, Employer established its entitlement to Section 8(f) relief. As a result of the1983 injury Claimant suffered from pre-existing degenerative arthritis of the right and left knees as well as degenerative joint disease of the right hip with a 20% impairment to the right lower extremity. Claimant's workplace, right knee injury of June 6, 1988 aggravated not only Claimant's right knee but left knee and hip joints as well. The 1988 injury according to credible testimony from Dr. Flanagan contributed to Claimant's disability making it substantially greater that it would other have been absent the prior 1983 injury. The manifestation requirement was met because the medical records in existence prior to Claimant's hire and his subsequent 1988 injury were such that Claimant's pre-existing disabilities could be determined and were of such a condition to motivate an employer to terminate Claimant because of the risk of compensation liability. *See White v. Bath Works Corp.* 812 F.2d 33,35 (1st Cir. 1987); *Director OWCP v. Vessel Repa Inc.,* 168 F. 3d 190, 196 (5th Cir. 1999).

E. Conclusion

Claimant was permanently and totally disabled from March 26, 1991 through July 31, 1991. From August 1, 1991 through January 10, 1995 Claimant was permanently and partially disabled with a weekly earning capacity of $246.71. Thereafter Claimant is and has been permanently and totally disabled.

Employer is liable for 104 weeks of compensation commencing March 26, 1991. through March 25, 1993 amounting to 18 weeks of permanent total disability or $8,041.50 (18 x $446.75) and 86 weeks of permanent partial disability or $23,685.26 (86 x $275. 41). From

March 26, 1991 Employer paid Claimant a total of $327,642.75 and thus overpaid Claimant. The Special Fund is liable to Employer for the overpayment and for commencement of compensation payments to Claimant effective March 26, 1993.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer is liable for 104 weeks of compensation commencing March 26, 1991 through March 25, 1993 amounting to 18 weeks of permanent total disability or $8,041.50 (18 x $446.75) and 86 weeks of permanent partial disability or $24,275.22 (86 x $282.27) plus interest and appropriate annual cost of living increases pursuant to Section 908 (a) , (c) and (f) of the Act. Thereafter the Special Fund is liable for payment of Claimant's permanent and total disability compensation benefits.

2. The Special Fund shall reimburse Employer for any monies it paid in excess of what it owed . The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge